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August 19, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: May 4, 2009

Case Number: TSO-0751

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the Individual") to obtain an access authorization.¹ The regulations governing the Individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual is eligible for an access authorization.² As discussed below, I find that the Individual should be granted an access authorization.

I. BACKGROUND

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- 1/ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.
- 2/ An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

This administrative review proceeding began when a Department of Energy (DOE) Local Security Office (LSO) denied the Individual's request for an access authorization based upon derogatory information in its possession that created substantial doubt pertaining to his eligibility. In accordance with 10 C.F.R. §710.21, the LSO subsequently issued a Notification Letter that included a statement of the derogatory information causing the security concern. The Notification Letter cited security concerns related to §§ 710.8(h), (j), (k) and (l) (Criteria H, J, K, and L, respectively).

The derogatory information supporting the Criteria H and J³ concerns states that the Individual admitted that he began drinking alcohol at approximately age 18. Notification Letter dated March 31, 2009, Enclosure 1 at 1. He also admitted that he consumed large amounts of alcohol during college, becoming intoxicated approximately once a week. *Id.* He reported during an Office of Personnel Management (OPM) interview that he received an alcohol violation during college for possession of alcohol by a minor. *Id.* Finally, the Notification Letter stated that in a report dated August 4, 2008, a DOE consultant psychiatrist diagnosed the Individual with alcohol abuse, which causes or may cause a significant defect in his judgment and/or reliability. *Id.* at 2.

The derogatory information supporting the Criterion K⁴ concern states that the Individual admitted on his December 3, 2007,

3/ Criterion H refers to information indicating that an individual has "an illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability." Criterion J refers to information indicating that an individual has "[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse."

4/ Criterion K includes information that the individual has "used. . . a drug. . . listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana. . .) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine or as otherwise authorized by Federal law."

Questionnaire for Investigations Processing (e-QIP) that he used marijuana five times between June and August 2005. Notification Letter dated March 31, 2009, Enclosure 1 at 2. He also admitted that he was arrested for possession of marijuana in August 2005. *Id.* at 2. Finally, he stated during a June 17, 2008, personnel security interview (PSI) that he purchased and used marijuana while visiting Amsterdam in May 2007. *Id.* at 3.

The derogatory information supporting the Criterion L⁵ security concern incorporates the Criteria H, J, and K security concerns. Notification Letter, Enclosure 1 at 3-4.

The Notification Letter informed the Individual that he was entitled to a hearing before a Hearing Officer in order to respond to the information contained in that letter. Upon receipt of the Notification Letter, the Individual requested a hearing, and that request was forwarded to the Office of Hearings and Appeals (OHA). A hearing was conducted in this matter in accordance with 10 C.F.R. §§ 710.25(e) and (g).

At the hearing, the Individual represented himself, testified on his own behalf and presented the testimony of his step-father, three co-workers and his supervisor. The DOE Counsel presented the testimony of the DOE consultant psychiatrist. The DOE entered seven exhibits into the record. The Individual entered three exhibits into the record.

II. The Hearing Testimony

A. The Individual

The Individual admitted that he consumed alcohol while in college. Hearing Transcript (Tr.) at 22. He believes he learned from his alcohol consumption and is a better person now. Tr. at 22. In explaining his college disciplinary action relating to alcohol, he testified that there were empty beer cans in his roommate's trash can. Tr. at 42. He had consumed some of the beer. Tr. at 44.

5/ Criterion L includes information that an individual engaged in "any unusual conduct or is subject to any circumstances which tend to show that an individual is not honest, reliable or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation or duress which may cause the individual to act contrary to the best interests of the national security."

He does not take the security clearance lightly. He wants to make a difference at DOE. Tr. at 23. He has been with DOE for 17 months. Tr. at 23. He has a regular attendance record. Tr. at 23. He wants to do the job he was hired to do. Tr. at 25. In his present position, he is responsible for \$1 million of equipment. Tr. at 25. Every item of equipment has been accounted for, which speaks to his integrity. Tr. at 25.

He testified that he presently consumes two to four beers when socializing with friends. Tr. at 31, 40, 57. He does not drive if he has even one drink. Tr. at 26. He has been a designated driver at least 50 times in his life. Tr. at 30. He has never had an alcohol-related legal problem. Tr. at 27. He does not have any social or interpersonal problems associated with alcohol. Tr. at 27. He does not get into arguments. Tr. at 27. He has not "blacked out," since one time in college over four years ago. Tr. at 28. He never drinks on the job, either during the work day or at lunch. Tr. at 28. Alcohol has never interfered with his work. Tr. at 26. He has no financial problems related to alcohol use. Tr. at 29. He can be around alcohol and not consume it. Tr. at 30. At this point in his life, he drinks no more than three to four beers when he goes out. Tr. at 31.

Regarding his marijuana use, the Individual stated that he was arrested on a beach while smoking marijuana in August 2005. Tr. at 32. He did not purchase the marijuana. Tr. at 45. The marijuana was purchased and brought to the beach by a friend. Tr. at 45-46, 48. He had three drug screens after his arrest to show that he was no longer using marijuana. Tr. at 52-54. After he received the Notification Letter, he had another drug screening, which was also negative,. Tr. at 33. He no longer associates with anyone who uses marijuana. Tr. at 51. As to his one-time May 2007 usage in Amsterdam, the Individual testified that he thought it was legal to use marijuana there.⁶ Tr. at 50, 55. He indicated that although

6/ While there was a difference of opinion among the parties about whether it is against United States law to use marijuana in Amsterdam, the parties did agree that it violates DOE policy for an employee or access authorization holder to use marijuana in Amsterdam. Tr. at 109-10. Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House) (Adjudicative Guidelines), Guideline E ¶ 16(e).
(continued...)

he had stated in his June 17, 2008, PSI that he had purchased the marijuana, it was actually his traveling companion who made the purchase. Tr. at 50. The Individual testified that the only times he has ever smoked marijuana were five to ten times between June and August 2005, and once in May 2007. Tr. at 49-50.

B. The Individual's Supervisor

The Individual's supervisor testified that he is delighted with the Individual's work performance. Tr. at 63. He handles sensitive equipment proficiently. Tr. at 63. He has done an excellent job. Tr. at 63. He has taken only one or two days off for illness. Tr. at 64. He has never been intoxicated at work. Tr. at 64. He has never smelled alcohol on the Individual at work. Tr. at 64. He has never seen any evidence that the Individual arrived at work "hung over." Tr. at 64. He does not know the Individual socially. Tr. at 65. The Individual has a positive attitude and an excellent academic record. Tr. at 67.

C. The Three Co-workers

The Individual's three co-workers all stated that they have known the Individual for about a year and a half. Tr. at 72, 86, 97. They indicated that they socialize frequently with him, usually several times a month. Tr. at 73, 87, 97. They testified that when they get together for drinks, the Individual has two to four beers. Tr. at 73, 87, 97. They have never seen the Individual involved in an altercation or become aggressive in connection with their get-togethers. Tr. at 75, 88, 99. They testified that they have never seen him intoxicated or abuse alcohol. Tr. at 74, 88, 98. They also confirmed that when they get together and consume alcohol, the Individual uses public transportation, rather than drive. Tr. at 75, 91, 99. These witnesses also stated that they have never known the Individual to be involved with marijuana. Tr. at 76, 90, 100.

D. The Individual's Step-Father

The step-father testified that he has known the Individual since the Individual was one and one-half years old. Tr. at 11. The

6/ (...continued)

However, at the time of the Individual's usage in Amsterdam, he was neither an employee of DOE, nor an applicant for a position at DOE.

Individual lived with him when he was growing up. Tr. at 11. The Individual graduated with high honors from high school. Tr. at 11. He graduated *magna cum laude* from the university he attended. Tr. at 11. He worked as a teaching assistant, which included grading papers for other students. Tr. at 11. One of his responsibilities in a job that he held was to turn on all the water for the city's swimming pools every day. He never missed a day or was late. Tr. at 11-12.

The step-father has witnessed the Individual with friends in his home. Tr. at 12. He never saw the Individual experience any problem with alcohol. Tr. at 12. The last three times the Individual returned to the step-father's home, he did not consume alcohol, although there were functions at which alcohol was present. Tr. at 17, 19-20.

E. The DOE Consultant Psychiatrist

The DOE consultant psychiatrist testified that he diagnosed the Individual with alcohol abuse. Tr. at 110. He based this diagnosis on the fourth criterion for substance abuse listed in the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorder, Fourth Edition, Text Revision (DSM-IVTR), claiming that the Individual was having persistent or recurrent social or interpersonal problems, as evidenced by his difficulty with obtaining his security clearance at DOE. Tr. at 125.⁷ He further believed that the problems that the Individual was experiencing with the DOE concerning his security clearance were recurrent, because they took place over a period of about one year. Tr. at 125-127.

The DOE consultant psychiatrist opined that although he believes the Individual has made a change in his alcohol consumption, he would like to see six more months of this behavior before he would rescind his diagnosis of alcohol abuse, as it relates to his current consumption of alcohol. Tr. at 114, 115, 116, 118, 124. When asked if the Individual's current alcohol consumption pattern as reported by himself and his co-workers was honest, would he still diagnose alcohol abuse, the DOE consultant psychiatrist

7/ Criterion A(4) provides: "continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g. arguments with spouse about consequences of intoxication, physical fights)."

stated that the Individual would need to be re-evaluated. Tr. at 115-16. The DOE consultant psychiatrist's report did not set out what behavioral change regarding alcohol consumption the Individual would need to accomplish to be considered rehabilitated or reformed.

III. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See *Dep't of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. *Personnel Security Hearing*, Case No. VSO-0002 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. *Personnel Security Hearing*, Case No. VSO-0005(1995). See also 10 C.F.R. § 710.7(c).

IV. Analysis

A. Criterion H

As indicated above, the Criterion H concern in this case involves the DOE consultant psychiatrist's diagnosis that the Individual's alcohol abuse constitutes a mental condition which causes or may cause a significant defect in the Individual's judgment or reliability. DOE Ex. 3 at 3.

In a case which relies on the opinion of a mental health expert, we generally give deference to that opinion. *E.g.*, *Personnel Security Hearing*, Case No. TSO-0233 (2005). In this case, I cannot. The DOE consultant psychiatrist's testimony and diagnosis

were not well thought-out. As I indicated above, the DOE consultant psychiatrist testified that he relied on the fourth criterion of the DSM-IVTR for substance abuse to find that the Individual is suffering from alcohol abuse. As noted above, that criterion involves substance use, despite recurrent interpersonal or social problems. In the present case, the DOE consultant psychiatrist could not articulate how the Individual's difficulty with the DOE in obtaining a security clearance was "interpersonal" or "social." I cannot perceive how the DOE consultant psychiatrist's claim that the difficulty that the Individual is having in obtaining his security clearance with the DOE qualifies as an interpersonal problem. On its face, the criterion relied upon by the DOE consultant psychiatrist does not apply to work problems.⁸ The ordinary reading of the criterion and its example indicates that it was intended to include problems with a spouse or other person. There is no evidence in the record that the Individual is having social or interpersonal problems. The DOE consultant psychiatrist did not provide any meaningful testimony that illuminated how DSM-IVTR Criterion A(4) is applicable here.

Further, I am not persuaded that the current proceeding involving the Individual's security clearance is a recurrent or persistent problem, as provided in the DSM-IVTR Criterion A(4). I see a one-time difficulty that the Individual is experiencing with respect to his security clearance. Therefore, I find that the DOE consultant psychiatrist's diagnosis of the Individual as suffering from alcohol abuse is unsupported by the facts. Moreover, the DOE consultant psychiatrist provided no support for his opinion that, to be considered rehabilitated, the Individual should have an additional six months of his current moderate alcohol consumption level, followed by another evaluation.

Based on the record before me, I find that the DOE consultant psychiatrist's diagnosis of alcohol abuse is not supported by the record or by the DSM-IVTR. Moreover, the DOE consultant psychiatrist could give no rationale for his opinion that the Individual needs an additional period of time in which to show that

8/ On the other hand, the first DSM-IVTR Criterion for substance abuse is intended to cover work issues. That Criterion states in pertinent part: "recurrent substance use resulting in a failure to fulfill major role obligations at work, school or home (e.g., repeated absences or poor work performance related to substance use. . .)." Criterion (A)1. In this case, the Individual's supervisor testified that the Individual's work performance is excellent. Tr. at 63-67. Thus, the concerns raised in Criterion A(1) are not applicable here.

he has changed his alcohol consumption. In summary, under these circumstances, I accord little weight to the DOE consultant psychiatrist's testimony. Therefore, I find that the Criterion H concern regarding the alcohol abuse diagnosis raised in the Notification Letter has been mitigated.

B. Criterion J

Even though the record here does not support a Criterion H security concern based on the DOE consultant psychiatrist's diagnosis of alcohol abuse, a Criterion J concern nevertheless does arise with respect to the Individual's alcohol use pattern, and whether he uses alcohol habitually to excess.

I find that the Individual has mitigated the concern raised by his alcohol use. I found the individual's overall testimony to be earnest and credible. He presented himself as a serious DOE employee. He testified credibly that he presently consumes no more than four beers while out socializing. He does not consume alcohol at all prior to driving an automobile. He further presented strong testimony from all of his witnesses corroborating his own testimony that he does not presently use alcohol in an excessive manner. The three co-workers with whom he socializes testified that he limits his alcohol intake to two to four beers when they socialize. They testified that he never consumes alcohol and drives. The Individual's step-father testified that he has never observed the Individual experience any problem associated with alcohol use. I am persuaded that the Individual is presently neither abusing alcohol nor consuming alcohol habitually to excess. Further, I am convinced that the Individual's demonstrated 14-18 month record of responsible alcohol consumption, as corroborated by the witnesses, is a sufficient period to mitigate the Criterion J security concern.

C. Criterion K

The corollary to Criterion K of the Part 710 regulations is Guideline H of the Adjudicative Guidelines. Guideline H states the following conditions could mitigate security concerns:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness or good judgment;

(b) a demonstrated intent not to abuse any drugs in the future, such as:

- (1) disassociation from drug-using associates and contacts;

- (2) changing or avoiding the environment where drugs were used;
- (3) an appropriate period of abstinence;
- (4) a signed statement of intent with automatic revocation of clearance for any violation.

Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (issued on December 29, 2005, by the Assistant to the President for National Security Affairs, the White House) (The Adjudicative Guidelines), Guideline H ¶ 26(a)-(b).

I find, based on the conditions set forth in the Adjudicative Guidelines, that the Individual has mitigated the Criterion K security concern. First, his initial marijuana use happened in 2005 and occurred in a discrete three-month period. The Individual testified convincingly about his past marijuana use. He testified that he used marijuana approximately five to ten times between June and August 2005. He also smoked marijuana one time in Amsterdam in May 2007. I find that this satisfies the conditions set forth in Guideline H ¶¶ 26(a) and (b)(3) and mitigates his use in college. In addition, he testified that he no longer associates with the acquaintances who used marijuana. The Individual's witnesses testified that they have never seen him use marijuana. This satisfies the condition set forth in Guideline H ¶ 26(b)(1).

Second, the Individual's use of marijuana in May 2007 occurred one time, in a possibly legal environment in Amsterdam. I find that it happened "under such circumstances that it is unlikely to recur." Guideline H ¶ 26(a). The Individual testified that he no longer associates with the companion with whom he used marijuana in Amsterdam, thus satisfying condition (b)(1) in the Guideline. As stated above, his current friends testified that the Individual does not use marijuana.

Further, I am convinced that the Individual's use in May 2007 fits the conditions set forth in ¶ 26(a), as well. It occurred over two years prior to the hearing and happened under circumstances that the use is unlikely to recur. I do find from his testimony and from that of the witnesses, that if the Individual were to return to Amsterdam in the future, it is highly unlikely that he would use marijuana again. All of the character witness testimony presented at the hearing supports and corroborates that the Individual is not using marijuana. I therefore find that the Individual has mitigated the Criterion K security concern.

D. Criterion L

The LSO raised a Criterion L security concern in this case based upon the derogatory information raised under Criteria H, J, and K. Because I have found that the Individual has mitigated those concerns, I likewise find that he has mitigated the Criterion L concern that was based upon those same concerns.

V. Conclusion

As the foregoing indicates, the Individual has resolved the security concerns cited in the Notification Letter. Accordingly, I conclude that granting him an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Therefore, the Individual should be granted an access authorization. The parties may seek review of this decision by an Appeal Panel 10 C.F.R. § 710.28(b)-(e).

Janet R.H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: August 19, 2009